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In The
Supreme Court of the United States

METROPOLITAN GOVERNMENT OF NASHVILLE-DAVIDSON COUNTY,
Petitioner,

v.

BRIAN PETTY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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March 2, 2009

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QUESTIONS PRESENTED

1. Whether a true conflict exists between the circuits concerning a veteran's "temperamental qualifications" under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4334 ("USERRA"), when the Sixth Circuit did not even reach this issue in its opinion.

2. Whether the Sixth Circuit's judgment about an extraordinary set of facts can possibly be read to increase the USERRA obligations of all employers, thereby raising an important issue of federal law worthy of the Court's attention.

3. Whether the non-final nature of the Sixth Circuit's decision and the ongoing litigation before the district court and civil service commission weigh against review at this time.

4. Whether Petitioner's perception of error in the Sixth Circuit's unanimous opinion, standing alone, warrants further review by this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent is a natural person and, therefore, does not have any disclosure to make under Sup. Ct. R. 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS INVOLVED 1

REASONS FOR DENYING THE PETITION 4

I. The Sixth Circuit's Decision Does Not Create a Circuit Split 5

II. This Case Does Not Present an Opportunity to Settle an Important Question of Federal Law 11

III. The Court Should Await a Final, Comprehensive Judgment in the Lower Courts 14

IV. Metro's Misguided Arguments on the Merits Do Not Warrant Review 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

American Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372 (1893) 14

Boag v. MacDougall, 454 U.S. 364 (1982) 17

Board of Education v. McCluskey, 458 U.S. 966 (1982) 17

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co., 389 U.S. 327 (1967) (per curiam) 15

Burns v. Reed, 500 U.S. 478 (1991) 18

Clegg v. Ark. Dep't of Corr., 496 F.3d 922 (8th Cir. 2007) 5

Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299 (4th Cir. 2006) 5

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 14

In re Petty, 538 F.3d 431 (6th Cir. 2008) ..... *passim*

Lapine v. Town of Wellesley, 304 F.3d 90 (1st Cir. 2002) 6

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 5, 11

Lewis v. Rite of Passage, Inc.,
217 Fed. Appx. 785 (10th Cir. 2007) 5

Major League Baseball Players Ass'n v. Garvey,
532 U.S. 504 (2001) (per curiam) 17

Petty v. Metro. Gov't of Nashville-Davidson,
No. 3:05-0680, 2006 U.S. Dist. LEXIS 83787
(M.D. Tenn. Nov. 16, 2006) 15, 16

Preda v. Nissho Iwai Am. Corp.,
128 F.3d 789 (2d Cir. 1997) 6

Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955) 11

Sheehan v. Dep't of the Navy,
240 F.3d 1009 (Fed. Cir. 2001) *5*

The Monrosa v. Carbon Black Export,
359 U.S. 180 (1959) 14

Va. Military Inst. v. United States, Va. Military Inst. v. United States,
113 S. Ct. 2431 (1993) 14, 17

STATUTES

38 U.S.C. § 4302 1

38 U.S.C. § 4302(b) 12, 17

38 U.S.C. § 4303(9) 8

38 U.S.C. § 4304 1

38 U.S.C. § 4304(2) 8

38 U.S.C. § 4312(f)(1) 12

38 U.S.C. § 4313 2

38 U.S.C. § 4313(a) 12

38 U.S.C. § 4313(a)(2) 7, 10

38 U.S.C. § 4313(a)(2)(B) and (4)(B) 18

38 U.S.C. § 4313(a)(3) 10, 13

38 U.S.C. § 4313(a)(4) 7, 8

38 U.S.C. § 4315 3

38 U.S.C. § 4315(c)(1) and (3) 18

RULES

Fed. R. Civ. P. 52(c) 15

Sup. Ct. R. 10 4

REGULATIONS

20 C.F.R. § 1002.181 12

20 C.F.R. § 1002.192 7

20 C.F.R. § 1002.198 ..... 7, 18

20 C.F.R. § 1002.225 13

OTHER

H. R. Rpt. 103-65, *reprinted in* 1994 U.S.C.C.A.N. 2449 8

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited in the Petition, this case requires consideration of the following:

38 U.S.C. § 4302. Relation to other law and plans or agreements

* * *

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4304. Character of service

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

(3) A dismissal of such person permitted under section 1161(a) of title 10.

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

38 U.S.C. § 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

* * *

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

* * *

38 U.S.C. § 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.

(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

(c) (1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.

(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.

(3) A determination pursuant to this subsection shall not be subject to judicial review.

(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

* * *

REASONS FOR DENYING THE PETITION

The Court has no reason at all—and certainly none of the "compelling reasons" identified in Sup. Ct. R. 10—to grant review to Petitioner Metropolitan Government of Nashville-Davidson County ("Metro"). Metro has unsuccessfully tried to manufacture a circuit split on an issue that the Sixth Circuit did not address. Furthermore, the decision below does not have major significance beyond the parties to the lawsuit. Metro brazenly violated the USERRA rights of Respondent Brian Petty ("Mr. Petty"), and the Sixth Circuit did not have to face any close questions about the meaning of the statute. The non-final nature of the Sixth Circuit's decision provides a further reason to deny the Petition. Developments below could easily interfere with this Court's review.

Though Metro makes an effort to fit within the criteria for a writ of certiorari, it principally tries to show that the Sixth Circuit made a mistake. The Sixth Circuit did not make a mistake. All members of the panel rejected Metro's position, and the full Sixth Circuit denied en banc review. More importantly, this Court does not devote its energy to error-correction, and it should not make an exception for this case.

I. The Sixth Circuit's Decision Does Not Create a Circuit Split

This Court has stressed the importance of not granting a writ of certiorari in the absence of "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ of certiorari after oral argument upon discovering that no circuit split actually existed). "'Precedent interpreting and applying the USERRA is sparse.'" *Lewis v. Rite of Passage, Inc.*, 217 Fed. Appx. 785, 786 (10th Cir. 2007) (quoting *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)). Given the recent vintage and clarity of the statute, the circuit courts have not yet had any major disagreements about its meaning. The Sixth Circuit's decision in this case, while adding to the sparse body of USERRA case law, does not create any conflict within it.

The Sixth Circuit began by adopting other circuit courts' views on the structure of USERRA and its various protections. *See In re Petty*, 538 F.3d 431, 439-40 (6th Cir. 2008) (citing *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006) and *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 930 (8th Cir.

2007)). It chose to "use this understanding of USERRA to examine Petty's claims." *Id.* at 440.

Metro claims to have found an inconsistency between the circuits relating to a veteran's qualifications for reemployment. According to Metro, the First and Second Circuits have required a veteran to be "temperamentally qualified" for a position, *see Lapine v. Town of Wellesley*, 304 F.3d 90, 103 (1st Cir. 2002), *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 792 (2d Cir. 1997), whereas the Sixth Circuit only requires that a veteran have a non-disqualifying military discharge and be physically qualified. Pet. Cert. at 29-32.

The Sixth Circuit clearly did not intend to contradict the First and Second Circuits on this issue. Notably, it did not even cite *Preda*. It did cite the district court decision in *Lapine* but for an entirely different proposition that it accepted. *See In re Petty*, 538 F.3d at 439. Metro brought these cases to the Sixth Circuit's attention and urged it to address temperamental qualifications, but the court found that unnecessary.

One cannot infer a circuit split from the language of the Sixth Circuit's opinion, either. A returning veteran's qualifications play a limited role in the USERRA analysis; they determine, in part, the reemployment position to which he or she is entitled. A veteran like Mr. Petty, whose period of service was more than 90 days, "shall be promptly reemployed in a position of employment in accordance with the following order of priority":

> (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or
>
> (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

38 U.S.C. § 4313(a)(2).

"In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service." 20 C.F.R. § 1002.192. "The employer must make reasonable efforts to help the employee become qualified to perform the duties of [the reemployment] position." *Id.* § 1002.198.

If, despite reasonable efforts by the employer, the veteran cannot qualify for either the escalator position or his original position, then he should enter the position that most nearly approximates the escalator, then the original position. 38 U.S.C. § 4313(a)(4).

USERRA narrowly defines qualifications to include only essential skills and characteristics. "The term 'qualified', with respect to an employment position, means having the ability to perform the essential tasks of the position." *Id.* § 4303(9). According to USERRA's legislative history, the provision for employees who do not qualify for their original positions "is primarily intended to deal with employees who return to technologically-advanced situations for which they cannot qualify . . . ." H. R. Rpt. 103-65, at 32, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2465.

To clarify, the Sixth Circuit did not hold that Mr. Petty qualified for his original job as patrol sergeant because he had a particular type of discharge. Mr. Petty's discharge under honorable conditions satisfied one of the four basic prerequisites for USERRA coverage—an issue preliminary to choosing the correct reemployment position. *In re Petty*, 538 F.3d at 440-41; *see* 38 U.S.C. § 4304(2).[1] The court repeated this in its discussion of Mr. Petty's qualifications for patrol only because Metro had blurred the two issues. The Sixth Circuit brushed aside Metro's doubts about Mr. Petty's qualifications because they all revolved around his conduct in the military. The military, not Metro, had authority to judge Mr. Petty's service, and it classified his discharge as under honorable conditions.

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[1] Metro argued that Mr. Petty failed to provide adequate documentation of his discharge because the DD-214 form he submitted was missing three fields at the bottom. *In re Petty*, 538 F.3d at 440-41. The Sixth Circuit concluded "that it would be inconsistent with the goals of USERRA to prevent Petty from exercising his right to reemployment because he failed to provide forthrightly information that is statutorily unnecessary to his establishing the right in the first place." *Id.* at 441.

See In re Petty, 538 F.3d at 441 ("But Petty's separation from military service is classified as 'under honorable conditions,' which Congress has made clear suffices to qualify him for USERRA benefits, 38 U.S.C. § 4304(2)."). Having found that Mr. Petty met the requirements for coverage, the court determined that he should have been reemployed as a patrol sergeant. *Id.* at 443-44.

The Sixth Circuit did not decide whether USERRA contemplates temperamental qualifications because Metro had not carried its burden of proving any disqualification. The employer has the burden of proof on this issue. *Id.* at 444.

> Metro has never *proved* Petty's disqualification for reemployment. Indeed, even today, approximately three years after Petty originally sought reemployment, Metro simply argues that, pending the outcome of its second investigation, it believes that Petty *may* be unqualified. Metro has wholly faile[d] to carry its burden of proving Petty's disqualification and has therefore clearly violated § 4313.

Id. (emphasis in original). Because of Metro's total lack of evidence, the court had no need to distinguish between different types of qualifications.

The Sixth Circuit never held, either expressly or impliedly, that a veteran is qualified for a position so long as he can satisfy the physical demands. It noted, "Metro does not question Petty's physical qualifications; instead, it questions only whether his conduct during his military service would disqualify him from returning to service in the police

department." *Id.* at 441. Metro warps this into meaning that it would have to question Mr. Petty's physical qualifications to prove him unqualified. However, the court was only explaining what was not at issue in the case.

First, it was cutting through Metro's self-serving statements about its return-to-work process. Metro contended that it was "obligated to 'ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officer is still *physically*, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department.'" *See id.* (emphasis added). In remarking that Metro did not question Mr. Petty's physical qualifications, the court simply ruled out one of the proffered justifications for Metro's policy so that it could proceed to the actual dispute.

Second, the court was keeping its analysis focused on the applicable provisions of the statute. The court determined Mr. Petty's reemployment position under 38 U.S.C. § 4313(a)(2), quoted above. *See id.* at 439-440, 443. USERRA contains separate, detailed provisions on the placement of veterans with disabilities. *See* 38 U.S.C. § 4313(a)(3). Hence, the court explained that Metro was not asserting a physical disqualification in order to prevent any confusion about the statutory framework.

The circuit courts do not disagree about USERRA. Metro disagrees with one of the circuit courts. This Court should conserve its limited resources for issues causing serious confusion in the judiciary.

II. This Case Does Not Present an Opportunity to Settle an Important Question of Federal Law

The Court does not "sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). It should only grant a writ of certiorari in "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *See Layne*, 261 U.S. at 393. The record shows an egregious disregard of Mr. Petty's USERRA rights, and the Sixth Circuit based its decision on the specific facts before it. Nobody disputes the importance of laws protecting veterans, but that does not make this case suitable for a hearing by this Court.

Metro has misrepresented the Sixth Circuit's holding in order to give it a broader application. According to Metro, "the Sixth Circuit held that USERRA prohibits employers from taking steps to determine whether returning veterans are 'qualified' to resume their jobs before returning them to work." Pet. Cert. at 23. The Court will struggle in vain to locate such a holding in the opinion. In reality, the Sixth Circuit held that "Metro's return-to-work process as applied to Petty was in violation of USERRA's reemployment provisions." *In re Petty*, 538 F.3d at 442. The Sixth Circuit has forbidden employers from acting as Metro did, not from evaluating veterans' qualifications altogether.

Metro abused the return-to-work process in a way that most employers would not attempt. It imposed numerous hurdles to Mr. Petty's reemployment. When Mr. Petty returned on March 21, 2005, it subjected

him to all manner of tests and reviews. *See id.* at 436 (return-to-work process included questionnaire, medical examination, computer voice stress analysis, drug screening, and a debriefing with a psychologist). It also required him to execute both medical and military records releases. *See id.* Nowhere does USERRA permit such tests and releases as part of the return-to-work process. The statute carefully sets out the veteran's responsibilities, *see* 38 U.S.C. § 4312(f)(1) (describing documentation that veteran must provide upon request), and those provisions supersede any local policy imposing "additional prerequisites," 38 U.S.C. § 4302(b).

Metro also drew out its investigations into Mr. Petty to justify not returning him to his original job. USERRA entitles veterans to be "promptly reemployed" in the mandated position. 38 U.S.C. § 4313(a). "'Prompt reemployment' means as soon as practicable," and "[a]bsent unusual circumstances," it must occur within two weeks. 20 C.F.R. § 1002.181. "Because of its return-to-work process, Metro took three weeks to 'rehire' Petty, and even then it did not place Petty in the correct position as outlined in § 4313." *In re Petty*, 538 F.3d at 444.

Metro began investigating Mr. Petty for not disclosing all of the circumstances of his discharge but concluded the investigation as "unfounded" within a few months. *Id.* at 436-37. It then began a second investigation into Mr. Petty's military history in August 2005, *id.* at 437, and still had not concluded that investigation by the time the district court entered summary judgment, *see id.* at 444 (noting that approximately three years had passed since Mr. Petty applied for reemployment). The Sixth Circuit rightly

concluded, "Metro cannot defeat the 'prompt reemployment' guarantee of § 4313 by engaging in never-ending investigations into Petty's qualifications." *Id.*[2]

Under the Sixth Circuit's decision, employers have the right to consider veterans' qualifications for a particular position. However, they cannot implement a return-to-work process that directly conflicts with the one outlined in USERRA. This is not a case in which the employer made a good faith effort to comply with several competing legal requirements.

Metro has alluded to other veteran's issues that have nothing to do with this case. It points to articles describing the prevalence of post-traumatic stress disorder and aggressive behavior among veterans. Pet. Cert. at 24-25. Metro did not claim in the lower courts that Mr. Petty suffered from these psychological problems. It only claimed that he might have been dishonest in the return-to-work process. *In re Petty*, 538 F.3d at 443. If Mr. Petty's military service had left him with a psychological disability, then other provisions of USERRA would have governed his reemployment rights. *See* 38 U.S.C. § 4313(a)(3); 20 C.F.R. § 1002.225. Metro cannot use the facts of other cases to justify review in this case.

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[2] Metro responds to the criticism of its slowness by foisting the responsibility onto Mr. Petty. *See* Pet. Cert. at 10 n.3. It cites as evidence its own brief to the Sixth Circuit and hearsay testimony by one of its witnesses during the bench trial on the off-duty work claim, testimony that was not part of the summary judgment record relevant to the reemployment claim. The parties did negotiate over the dates for certain meetings and such, but this cannot excuse years of delay by Metro.

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 184 (1959). No doubt, future USERRA cases will raise important questions of statutory interpretation and public policy. This one does not.

III. The Court Should Await a Final, Comprehensive Judgment in the Lower Courts

"We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States, Va. Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring). In support of this rule, the Court has explained that "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). The parties are still litigating multiple USERRA claims that involve Mr. Petty's experience in the return-to-work process—"a fact that of itself alone furnishe[s] sufficient ground for the denial of the application . . . ." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Due to the inefficiencies and pitfalls of piecemeal litigation, the Court should not grant a writ of certiorari at this time.

Developments on remand may interfere with review by this Court. In addition to his reemployment claims, Mr. Petty alleged that Metro discriminated against him by denying him permission to engage in off-duty work as a private security guard. *In re Petty*, 538 F.3d at 438 The district court held a bench trial

on this claim and entered a judgment on partial findings for Metro pursuant to Fed. R. Civ. P. 52(c). *Id.* Because the district court failed to consider all of the evidence, the Sixth Circuit vacated the judgment on partial findings and remanded the claim for further proceedings. *Id.* at 448. Metro did not seek a stay of the Sixth Circuit mandate, and the case is actively proceeding before the district court.

Although Metro is not asking this Court to review the judgment on partial findings, any number of things could happen in the ongoing litigation that would make this Court's involvement fruitless. The parties may reach a settlement, thereby mooting the controversy after the Court begins studying it. If the Court found a genuine issue of material fact on the reemployment claim, it would presumably remand the claim for a trial. At that point, the district court may have already awarded Mr. Petty the relief he seeks on some other basis. Either party may make an admission or otherwise prejudice its case so as to warrant summary disposition, regardless of how this Court rules. One cannot anticipate all of the possibilities, but these few illustrate the wisdom of letting the case run its course. *Cf. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case, [and] it is not yet ripe for review by this Court").

Metro has increased the problems of review by waiting to terminate Mr. Petty while the case was on appeal. Metro obtained summary judgment by telling the district court that it had good reasons to investigate Mr. Petty and should not have to return him to patrol until it finished. *See Petty v. Metro. Gov't*

of Nashville-Davidson, No. 3:05-0680, 2006 U.S. Dist. LEXIS 83787 at *29 (M.D. Tenn. Nov. 16, 2006) ("As for Defendant's failure to return Plaintiff to a patrol position, Defendant argues that it is warranted in taking this action, at least until OPA concludes its second investigation . . . ."). On December 7, 2007, approximately three weeks after the parties submitted their final briefs to the Sixth Circuit, Metro suddenly concluded its investigation and terminated Mr. Petty for being dishonest in the return-to-work process. The Sixth Circuit learned of this at oral argument but could not review his termination in the first instance. *See In re Petty*, 538 F.3d at 444 n.7. On remand, the district court has allowed Mr. Petty to supplement his complaint to include another USERRA claim for discriminatory and retaliatory discharge.[3]

Like the off-duty work claim, the termination claim can have unpredictable consequences. Mr. Petty is seeking reinstatement as a patrol sergeant with back pay. If the district court awards such relief, then this Court would effectively be deciding whether Mr. Petty gets a week or so of compensation for the delay in rehiring him when he first returned. *See In re Petty*, 538 F.3d at 448 (instructing district court to calculate damages on reemployment claim). The posture of the case makes review inappropriate at this time. Metro has no one but itself to blame; it engaged in gamesmanship precisely to avoid judicial review.

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[3] Mr. Petty also appealed his termination to the Metro Civil Service Commission, a local administrative agency that reviews personnel decisions under the Metro Charter and Metro Code. The parties have already presented evidence to an administrative law judge and are awaiting her decision about Mr. Petty's right to reinstatement and back pay.

The Court can review all aspects of the litigation once it reaches a final conclusion. *See Va. Military Inst.*, 113 S. Ct. at 2432; *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). It should not consider taking up the matter until that point.

IV. Metro's Misguided Arguments on the Merits Do Not Warrant Review

"[W]e must never forget that this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). "We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review." *Board of Education v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting). The argument headings in Metro's Petition show that the principal basis for it is a perceived error by the Sixth Circuit. That alone cannot justify a writ of certiorari. Metro has no convincing argument on the merits, at any rate.

Metro wants to shape federal law to fit its return-to-work process, rather than conform itself to federal law. It cannot succeed because USERRA expressly preempts local laws and policies. *See* 38 U.S.C. § 4302(b). An employer does not have the freedom to demote a returning veteran while it conducts a sham investigation for several years.

To rule for Metro, the Court would have to graft a police department exception onto USERRA. Metro gravely discusses the role of police officers and its need for total discretion on personnel issues. However, it cannot reconcile this view with the text of the statute.

See In re Petty, 538 F.3d at 441 ("In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns."). Congress carved out an exception for employees in the federal intelligence-gathering community, giving agencies like the Federal Bureau of Investigation the discretion to decide whether reemployment is "impossible or unreasonable" without judicial review. *See* 38 U.S.C. § 4315(c)(1) and (3). Local police departments, by contrast, have to obey the same rules as private employers. If Metro disagrees with this policy, then it must petition Congress to change it. *See Burns v. Reed*, 500 U.S. 478, 493 (1991) (the Court should discern Congress' intent in enacting a statute, not make its own "freewheeling policy choice").

Finally, Metro cannot prevail on the qualifications issue because it did not attempt to qualify Mr. Petty for the patrol job. USERRA requires "reasonable efforts" by the employer to help qualify a veteran for the relevant position. *See* 38 U.S.C. § 4313(a)(2)(B) and (4)(B); 20 C.F.R. § 1002.198. The record discloses no effort whatsoever by Metro to do this. Mr. Petty raised this point to the Sixth Circuit, but the court did not address it in light of its other rulings.

CONCLUSION

Metro has not presented any compelling reason for the Court to grant the Petition. Therefore, Mr. Petty respectfully requests that the Petition be denied.

Respectfully submitted,

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